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IN THE

Supreme Court of the United States

October Term, 1963

No. 481

VENDO THEATRE CORPORATION, *Petitioner*,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.,
Respondents.

BRIEF FOR THE PETITIONER

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

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October Term, 1963

No. 481

VIKING THEATRE CORPORATION, *Petitioner*,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.,
Respondents.

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 2766-92) is reported at 320 F.2d 285.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1963. R. 2793. Certiorari was granted December 9, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the trial court was based on the Clayton Act, §§ 4, 16, 38 Stat. 731, 737, 15 U.S.C. §§ 15, 26.

QUESTIONS PRESENTED

1. Whether a court may take from the jury consideration of a classic *per se* violation of the Sherman Act—a division of the market—when the existence of the restriction is admitted by the alleged conspirators.

2. Whether the Sherman Act is violated by a "split" agreement among three of the eight first-run film exhibitors in Philadelphia, controlling seven of the twelve first-run theaters and 83.2% of the first-run seating capacity, and the seven major film distributors, whereby the three exhibitors divide among themselves the total product of the distributors and each of the three undertakes not to compete with either of the others but to compete only with the five non-participating exhibitors who control a total of only 16.8% of the available seating capacity.

3. Whether the Sherman Act is violated when such a "split" agreement is supplemented by an additional agreement among at least two of the three splitting exhibitors and at least one of the distributors that, in the event of competition for a film by any of the five non-participating exhibitors, if the distributor should reject all bids, he would thereupon negotiate exclusively with the exhibitor to whom the film was allocated in the split.

4. Whether the Sherman Act is violated by the "split" agreement described in Question 2 when the three splitting exhibitors use the dominant market power obtained by means of the agreement to gain over the non-participating exhibitors such discriminatory market advantages as exclusive negotiating rights with distributors for films, better terms for

similar type pictures, more advantageous adjustments of license terms when a film does not live up to expectations, and a larger proportion of high quality pictures per theater.

5. Whether the evidence to prove a conspiracy in violation of the Sherman Act may be limited to transactions in which the plaintiff was involved, excluding all other evidence of the defendants' activities germane to market domination and discrimination between the plaintiff and his competitors.

6. Whether the court below, by its holdings on the issues inherent in Questions 1-5, has not so severely limited the private antitrust suit as to cripple it as a device for enforcement of the antitrust laws, thereby expanding the litigation task of the Department of Justice and, consequently, increasing the burden of the Court in this field.

STATUTES INVOLVED

Section 1 of the Sherman Act, c. 647, 26 Stat. 209, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 2 of the Sherman Act, c. 647, 26 Stat. 209, 15 U.S.C. § 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction there-

of, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

The petitioner, Viking Theatre Corporation, owns a single first-run theater in downtown Philadelphia.

The respondents include seven major film distribution companies and three film exhibition chains. The seven respondent distributors, who admittedly dominate the distribution field, are Paramount, Columbia, Universal, United Artists, Warner Bros., MGM, and Twentieth Century Fox.[1] The respondent exhibitors are William Goldman Theatres, Inc. ("Goldman"), Stanley Company of American and Stanley Warner Management Corporation (jointly called "Stanley Warner"), and Fox Philadelphia Building, Inc. ("Fox"), an affiliate of National Theatres, Inc.

Goldman owns twelve theatres in and around Philadelphia including three first-run theaters in downtown Philadelphia. R. 1630-31. Stanley Warner controls an exhibition circuit of over 300 theaters, including three first-run theaters in downtown Philadelphia. National Theatres, Inc. is the operator of a nationwide theater chain, including a single first-run theater in downtown Philadelphia. R. 1766.

On November 12, 1956, the petitioner filed suit in the United States District Court for the Eastern Dis-

[1] The full names of the respondent distributors are Paramount Film Distributing Corporation, Columbia Pictures Corporation, Universal Film Exchanges, Inc., United Artists Corporation, Warner Bros. Pictures Distributing Company, Metro-Goldwyn-Mayer, Inc., and Twentieth Century Fox Film Corporation.

trict of Pennsylvania under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, alleging that the seven respondent distributors conspired with the three respondent exhibition chains to drive the petitioner out of business in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. R. 5-12. At the close of the petitioner's evidence, the district court directed a verdict for the respondents on the ground that there was insufficient evidence to submit to the jury. R. 2352-54. On appeal, the Third Circuit Court of Appeals affirmed. R. 2793. This Court granted certiorari on December 9, 1963. R. 2794.

Philadelphia Market Restrictions: The Split System

Viking entered the first-run motion picture market on July 2, 1954. R. 1512. From that date until November 19, 1956, the period covered by this suit, the distributors of motion pictures recognized the following theaters in the Philadelphia area as first-run theaters:

FIRST-RUN PHILADELPHIA THEATERS

Theater	Location	Owner	Seating Capacity Floor	Balcony	Total	% of Phila Seating
Viking	19th and Chestnut	Viking	947	70	1017	5.6
Goldman	15th near Chestnut	Goldman	988	200	1188	6
Midtown	Chestnut near Broad	Goldman	994	0	994	5.4
Randolph	12th & Chestnut	Goldman	1366	654	2020	11
Mastbaum	21st & Market	Stanley Warner	2498	1889	4387	24
Stanley	19th & Market	Stanley Warner	1450	1482	2932	16
Stanton	16th & Market	Stanley Warner	783	590	1373	7.5
Fox	16th & Market	Fox	1333	1089	2422	13.3
Translux	16th & Chestnut	—	493	0	493	2.7
Arcadia	16th & Chestnut	—	650	0	650	3.6
Studio	Market near 17th	—	400	0	400	2.2
World	Market near 18th	—	499	0	499	2.7
					18375	100

In spite of the number of theaters and owners on the date of Viking's entry, there was no substantial competition among exhibitors for first-run pictures. The market was controlled by no-competition agreements among the three respondent film exhibitors who controlled 83.2% of the first-run theater seating capacity. These agreements, in which the seven respondent distributors concurred, in effect allocated the product of the distributors among these three exhibitors.

In 1951, in a meeting with the general manager of MGM, R. 1634, Mr. Goldman prevailed on MGM to split its product between the Goldman and Stanley Warner theaters in offering it to exhibitors in the Philadelphia market. By the summer of 1953, similar arrangements had been worked out with United Artists, Columbia, Universal, Paramount, and Warner Bros. R. 85, 124-30. The operation of the split was described as follows by Simon Fabian, president of Stanley Warner:

> "Well, the usual method is that a group of pictures, we will say six pictures, are on the release schedule of the Paramount Company or the Warner Company, and either Goldman or Stanley will arrange a split of these two products, three and three, three on each side. Then the one who does not arrange the split has the right to the first pick of these two groups. The next group of six pictures will be split by the other party, and the one who didn't pick the first pick as between the two groups." R. 102.

Mr. Goldman's insistence on the split was based upon his belief, after forty years experience in the business, that competitive bidding for pictures was "disastrous" to his economic success, R. 1752, because

it tended to drive up the price for films, R. 1634-36. As he described the situation in 1951 when he approached MGM, at a time when he felt that Stanley Warner was the only other competitive force in the Philadelphia first-run market:

> "Well, Warner's was getting all those pictures, they had all the pictures, the only way I could obtain those pictures was by bidding on them, and I told them [MGM] I wanted a division of the pictures with Warner's without having to meet the bidding situation and I indicated how unsound it was economically to acquire those pictures. R. 1751.

Ostensibly, the split was not a final allocation of films, but merely an agreement between Stanley Warner and Goldman on the films for which they would bid. The sole purpose of the split, as seen by Mr. Fabian, president of Stanley Warner, was to eliminate all competition between his and the Goldman theaters. R. 79-82. In theory, all the other independents, including Viking when it entered the market on July 2, 1954, were free to bid on every film. In fact, however, because of the weak competitive position of the independents, Mr. Fabian admitted that the split increased the number of films on which his theaters had no competition whatsoever, films which could be obtained by negotiating with a distributor who had no alternative Philadelphia outlet. R. 81-82.

Mr. Goldman's objective, however, was more far-reaching than a simple split. For the reasons already stated, he was opposed to bidding. He refused to bid competitively against even the independents. He submitted a bid on only one film in which Viking was interested during the whole period of this suit, and on that one, he personally wrote a letter to Paramount

pointing out that this was an exception rather than a change in policy. R. 2386. His alernative to bidding against the independents was exclusive negotiations after the bids of all the independents had been rejected. In furtherance of his objective, he met with Mr. Fabian and Alfred Schwalberg, then president of Paramount, in the summer of 1953 to formalize his version of a satisfactory split agreement. R. 83-85. As the agreement was described in a memorandum from Hugh Owen, vice president of Paramount, to George Weltner, Schwalberg's successor as president:

> "The so-called 'Schwalberg agreement' with Goldman of Philadelphia envisaged an equal division, qualitively and quantitively (sic), of our product between Goldman and Stanley Warner in Philadelphia.
>
> "Under this arrangement bids were invited from Stanley Warner and Goldman, as well as other theatres in Philadelphia requesting a bid invitation. If any bid was acceptable the acceptance closed the sales file. If no bid was acceptable, Paramount agreed to negotiate with either Stanley Warner or Goldman, governed by whether the individual picture was on Goldman's or Stanley Warner's split.
>
> "My understanding is that we were not permitted, if all bids were rejected, to negotiate with the unsuccessful bidders or any other theatre that did not offer a bid. We were obligated, upon rejection of all bids, to negotiate with one or the other, and I am told that, in one or more cases, the negotiated deal was reviewed or adjusted.
>
> "This arrangement whether authorized or not, was actually in effect." R. 2393.

As Mr. Schwalberg described Mr. Goldman's position: "He didn't want Paramount to take that [nego-

tiated] bid across the street and try to better it." R. 1834.

Although the respondents attempted to show that the Schwalberg agreement did not exist, or in the alternative, was never put into effect, the Court of Appeals held that a jury issue was presented on the existence and operation of the agreement.[2] And, as will be shown shortly, Mr. Goldman had this same arrangement with other distributors.

Fox Theater Participation in the Split System

Fox Theater was not a member of the formal split agreements between Goldman and Stanley Warner. It did not, however, compete with them. It sought films exclusively from Twentieth Century Fox and did not bid on the films of the other major distributors. In return, Goldman and Stanley Warner agreed not to bid on Twentieth Century Fox films although all the other independents did. R. 87-89. As Mr. Fabian put it:

> "Well, we thought that as long as the Fox Theatre was playing exclusively Fox pictures there was no purpose in our trying to take Fox pictures away from them in any quantity, because they would then try to get other pictures in the market, and there would have been no gain or loss one way or the other." *Ibid.*

The care with which this policy was followed and its intricacies become clear from the testimony of Mr. Ted Minsky, Stanley Warner's film buyer:

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[2] The issue was not remanded for submission to the jury because the court held as a matter of law that no conspiracy was shown since only one distributor was party to the agreement. This conclusion was clearly erroneous as is shown pp. 39-41, *infra*.

A. I would say that we did not seek the Fox pictures, normally speaking.

Q. And what were the circumstances, if any, under which you would seek Fox pictures?

A. Perchance, if a Fox picture was going to be available and we saw by the way the Fox pictures were lined up in the Fox Theater, that he wouldn't be able to play all of those pictures, that may have been an occasion to do that. R. 1593.

Apparently the distributor, Twentieth Century Fox, was perfectly aware of the rules of the game, for it offered a film to Goldman and Stanley Warner only after it had been turned down by Fox Theater. As Mr. Goldman described the situation:

"Well, we never went after any Fox pictures. I think when there was a picture the Fox Theater didn't want, it was offered to us." R. 1745.

Distributors' Acquiescence

The distributors acquiesced in this split system even though it was detrimental to their interest. William Mansell, the Warner Bros. branch manager, stated emphatically that Warner Bros. would have received higher rentals for its films had Stanley Warner and Goldman been competing with each other. R. 2010.[8]

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[8] His testimony on the point was:

Q. I asked you whether or not it isn't true that if there had been no split, and Goldman had been bidding against the Stanley Warner for Warner Brothers pictures, that wouldn't have put ultimately more money in the pockets of your company if they had been bidding against each other?

A. Oh, if there were bidding—if they were bidding, rather.

Q. Yes.

A. (continuing) Against one another it would in my opinion result in more money. No question about it.

Q. For Warner Brothers?

A. Oh, yes. R. 2010.

The reason the distributors acquiesced in the split could only have been that, since the severance of the exhibition business from the distribution business which the *Paramount* decrees[4] effected, the decisive bargaining power has resided with the large exhibition chains.[5] Each of the respondent exhibitors in this case is backed by such a chain. See p. 4, *supra*.

In light of this split system, it is apparent that there was insubstantial competition for films in the Philadelphia market prior to Viking's entry on July 2, 1954.

Viking's Entry Into the Market

From 1924 until 1953, Stanley Warner operated the Aldine as a first-run theater. R. 64, 1496-97. In March 1953, Simon Fabian of Stanley Warner decided to "eliminate it as a theater" because of its poor physical condition. R. 68. On June 22, 1953, Stanley Warner agreed to sell the Aldine to Harry Sley, R. 1495, and title was transferred in September. R. 1502.

When Sley began to renovate the theater, Fabian, fearing Sley's competition, attempted to buy the theater back and close it; however, the parties were unable to agree on a repurchase price. R. 74-78; 1502-03.

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[4] *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131.

[5] "The buying power of large circuits in dealing with distributors remains a crucial issue in spite of divorcement and some individual divestitures. Does not the bargaining power of the entire circuit (100 theatres of Loew's or 500 of American Broadcasting-Paramount Theatres) stand behind the booking for each of its theatres?" Conant, *Antitrust in the Motion Picture Industry* 144 (1960).

Sley then completed the renovation, installing air-conditioning, the finest projection equipment available, a wide screen, and new seats with additional leg room, R. 1503-05, correcting the very defects which had initiated Fabian's decision to close the theater. On July 2, 1954, petitioner, Sley's corporation, opened the theater as the Viking. R. 1512. Situated in the midst of the Philadelphia theater district, see chart *supra,* the Viking was in a prime position to compete for films and audiences. As such, it represented a breath of fresh competitive air in the Philadelphia market and a substantial threat to the split system.

ECONOMIC EFFECTS OF THE SPLIT SYSTEM

Elimination of Competition

Had the respondent exhibitors appointed a single agent to buy film for all their theaters and then allocated the films and revenues among themselves, this case could have been decided in favor of the petitioner on summary judgment. Such pooling arrangements were found to violate Section 1 of the Sherman Act in *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 149, because they had "the effect of nullifying competition between the allied theatres and of making more effective the competition of the group against theatres not members of the pool." The Court concluded, "These practices were bald efforts to substitute monopoly for competition. . . . Clearer restraints of trade are difficult to imagine." There are, however, more ways than one to construct a system designed to eliminate competition. Just as effective as the *Paramount* combination to monopolize the total

market is a combination to divide the total market into sub-markets, each to be monopolized by one of the co-conspirators.

The one fact on which all the respondents agree is that the split system eliminated all competition among the three respondent exhibitors, rendering non-competitive 83.2% of the available seating in the Philadelphia market. While the method chosen, a division of the market, was not as simple and clean cut as a pooling arrangement, the net effect, as the following will show, was the same.

Division of the Market

The split system created a three-way division of the Philadelphia first-run theater market among the films on the Goldman split, films on the Stanley Warner split, and films distributed by Twentieth Century Fox. Each of the three respondent exhibitors, as already shown, concentrated its total market power into one of these three sub-markets. Viking and the other independents, however, continued to compete for all films. The inevitable consequence to them was to divide their total market power proportionately among the three sub-markets rather than concentrate it in any one. When this simple analysis of market structure is put into figures, the result is startling.

As a relevant yardstick of market power, the petitioner has chosen the seating capacity controlled by each of the exhibitors in the Philadelphia market. This yardstick gives due weight to each theater's size, a competitive factor repeatedly stressed by the respondents in all the proceedings below. As the chart,

supra p. 5, shows, the Goldman theaters controlled 4202 seats, the Stanley Warner theaters 8792, Fox 2422, Viking and the independents 3059—or in percentages: 22.4%, 47.5%, 13.3%, and 16.8% respectively of the total Philadelphia market. When these figures are recast in terms of the sub-markets, with the market power of Viking and the independents being divided equally among the three sub-markets (3059/3=1020), the following results:

Theater	Market Power in terms of Seating	% Sub-market controlled	% Total Market controlled
GOLDMAN SPLIT:			
Goldman	4202	80.5%	22.4%
Viking & Indep	1020		
	5222		
STANLEY WARNER SPLIT:			
Stanley Warner	8692	89.5%	47.5%
Viking & Indep.	1020		
	9712		
FOX SPLIT:			
Fox	2422	70.4%	13.3%
Viking & Indep.	1020		
	3442		

Behind these changes in market percentages lies the raison d'etre for the split system. The three respondent exhibitors move out of a market containing strong and near-equal competitors to a smaller sub-market in which each exercises near-monopoly power against the intermittent competition of the Viking and smaller

independents. This result is, as a matter of fact, the key to a successful division of the market. As the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955), p. 26, states:

> "The contracting parties [to a division of the market] gain only if the result is to give each a substantial degree of power in his own market."

Faced by the respondent exhibitors with monopoly bargaining positions over the films on their respective splits, distributors could be expected to discriminate in favor of the monopolists and against Viking.[6] The record more than substantiates this expectation.

Discriminatory Practices

A summary of the discriminatory practices found in the record requires a more extensive description of the motion picture industry. Since each motion picture is a unique combination of story and cast, it is impossible to extrapolate with precision the box-office appeal of an untested film. The only dependable rating is one calculated on hindsight based on the total rental earned by the picture during its exhibition across the country, a term known as the national film rental. Since no such standard is available before exhibition, the exhibitor must use his best judgment in formulating a bid based on a screening of the picture and his expertise in pre-judging the tastes of his

[6] In the Petition for Certiorari, the petitioner showed the respondent exhibitors' monopoly bargaining power over their respective splits in terms of the intervals at which Viking was in the market for films. The petitioner does not intend to abandon this argument and considers it a valid alternative method of showing the same essential fact.

local market. The substance of his bid will then include a guaranteed playing time, film rental terms, and extras such as advertising agreements. Because of the difficulty in pre-judging a film, the film rental is usually based on a sliding percentage of the box-office receipts such that the exhibitor and distributor share in either the gains or losses of an individual film. In addition to the percentage rental, however, exhibitors, in the face of competition, will often guarantee a minimum rental irrespective of the success of the film.

Once a license is granted, the exhibitor is legally bound by its terms. But because of the difficulty in pre-judging a picture, the actual box-office receipts may vary substantially from the estimate on which the original offer was based. When this occurs, it is usual for the exhibitor to seek an adjustment with the distributor on either the length of the run or the rental terms.

The record in this case overwhelmingly demonstrates that the respondent distributors discriminated in favor of the respondent exhibitors in granting adjustments. As Viking offered to prove, the respondent exhibitors received the following film rental adjustments, during the period of the suit (R. 1049-50):

	Number of Adjustments	
Exhibitors	Total	Average Per Theater
Goldman	48	16
Stanley Warner	82	27.3
Fox	13	13

Viking, by way of contrast, received film rental adjustments on only *two* first-run pictures. R. 498-499; 1049.

Viking's failure to receive more than two film rental adjustments was not for lack of trying. It requested and was refused rental adjustments on 19 of the 32 first-run pictures it played during the period of the suit.

The facts relating to playing time adjustments are similar. Typical of the attitude of the respondent exhibitors was the remark by Mr. Beattie of Goldman that it was his practice to terminate the run of a picture at Goldman's Randolph Theater when the weekly gross got down to about $10,000. Such action was taken irrespective of the contractual provisions of the license and often over the objection of the distributor. R. 1828-29. But the distributors always submitted. When Viking attempted self-help in adjusting either rental or playing time, the distributors were by no means as submissive. On three occasions, they brought suit on the contract for total film rental due and recovered. R. 303 (Twentieth Century Fox); 624-26 (MGM); 698 (Universal).

The pattern of discrimination practiced by respondent Universal warrants special attention. The first Universal picture in which Viking expressed an interest was "All That Heaven Allows." Negotiations for the film were held in New York with Mr. Dana, Universal's division manager. To get the one picture Viking wanted, Mr. Dana insisted, contrary to the anti-block booking decree in *United States* v. *Paramount Pictures, Inc.*, 344 U.S. 131, that Viking also take three other pictures, only one of which it had screened, and pay film rental guarantees totalling $85,000. R. 205-210. Mr. Dana stated that he would have to have the guarantees in order to explain to

Goldman and Stanley Warner why Viking got the pictures. R. 209. As a result of being compelled to take the package (by its need for film and by Universal's refusal to sell less than the package), Viking was tied up for thirteen weeks with the following disastrous financial results, R. 2605:

Picture	Box-Office Receipts	Earned Film Rental	Guarantee	Film Rental Paid
"Second Weakest Sex"	$ 20,186	$ 4,735	$17,500	$17,500
"All That Heaven Allows"	54,763	28,242	27,500	28,242
"There's Always Tomorrow"	19,780	7,503	17,500	17,500
"Never Say Goodbye"	20,799	6,472	22,500	22,500
Totals	$115,528	$46,952	$85,000	$85,742

Upon licensing the four films, Mr. Dana informed Viking, in conformity with the usual trade understanding, "If you are hurt in any way, you come back and see me and I will make sure that you are not hurt." R. 209. After the losses shown above, Viking did seek an adjustment. At one point Universal offered a $15,000 adjustment, but withdrew it with the remark:

> "Well, I have offered you $15,000, but I understand you fellows are bringing an antitrust action, and I don't intend to give anybody any money that intends to sue my company." R. 303.

Universal then brought suit on the license contract for the full rental guarantee. R. 698.

Universal's treatment of Goldman and Stanley Warner is startling by contrast. During the period of the suit, there were ten Universal pictures grossing over $19,000 on Philadelphia first-run, seven of them played by Goldman and three by Stanley Warner. On every single one of the ten pictures Universal gave a film rental adjustment, Goldman receiving a

total of $15,722.52 and Stanley Warner a total of $16,866.90. Moreover, on six of the seven pictures it played, Goldman was allowed to cut the run by from one to three weeks. On two of its three, Stanley Warner was allowed to cut the run by one week. R. 2603-04.[7]

Viking's experience with Universal serves also to illustrate a further weapon of discrimination: the minimum rental guarantee. The more guarantees an exhibitor must offer, the greater the likelihood he will suffer the type of financial reverses Viking encountered with the four Universal films. To obtain film product, Viking had to offer guarantees on 14 of the 32 first-run films it played during the suit period. R. 209; 299; 301-03; 914; 1537-38. By contrast, Goldman was required to offer a guarantee on only one of the 134 pictures it played. R. 1780-81. That one, "Country Girl," starring Grace Kelly, particularly interested Mr. Goldman because of his friendship with the Kelly family. R. 1727-28. Shortly after the bidding deadline closed on the film, he phoned in a late bid

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[7] Although it may appear as if Viking were offered a film rental adjustment equal to that given Goldman and Stanley Warner, it is an illusion. Viking had to offer guarantees on all four of its films; Stanley Warner offered a guarantee on only one of its three; Goldman offered no guarantees on its seven. The $15,000 adjustment offered to Viking as a reward for not bringing the instant action applied only to the guarantees and would have left Viking's film rental payment to Universal still $24,790 in excess of the rental actually earned by the films under the terms of the license. The adjustment to Stanley Warner, on the other hand, brought the rental on the one film with a guarantee down to the earned film rental and on the other two films well below earned film rental. The Goldman adjustment reduced the payments on all seven of his films well below earned film rental. R. 2603-05.

with a $75,000 guarantee. (Mr. Goldman was unable to explain why this guarantee just happened to equal the one submitted by the Trans-Lux, R. 1870, since he steadfastly maintained he did not know what anyone else had bid. R. 1707.) Thereupon all bids were rejected, and the Paramount general manager, Mr. Howard Minsky, and Mr. Ulrik Smith visited Mr. Goldman with instructions from Mr. Schwalberg to obtain a new bid from Mr. Goldman in writing. R. 1865-67. Although all the other exhibitors were accustomed to submitting written bids on the provided forms, Mr. Goldman had never before put a Paramount bid in writing during the period of this suit, R. 1867-68, and the most Mr. Minsky could obtain was a summary of terms handwritten by Mr. Goldman on a scratch pad. R. 1707; Exh. P-23, R. 2417. Needless to say, Mr. Goldman obtained this Academy Award winning picture for the Midtown, a theater slightly smaller than the Viking.

The ultimate proof of discriminatory use of monopoly bargaining power is shown by an analysis of Mr. Goldman's bidding practices. The most usual marketing procedure followed by the distributors in the Philadelphia market was to send out requests for bids on a specific film to all the interested exhibitors with a common deadline for submitting the bids. United Artists, Paramount, and Warner Bros. requested written bids. R. 1927-30; 2462; 2614-18. MGM accepted both written and oral bids. E.g., R. 2518. Columbia engaged in "competitive negotiations" which, according to its district manager, had the same mechanics as bidding and gave every interested exhibitor a chance at a picture. R. 2217-18. Universal negotiated many of its films with one exhibitor alone.

R. 678. If a distributor was dissatisfied with the bids for any reason, it could reject them all and either request new bids or proceed to negotiate with individual exhibitors. Negotiations were of two essential types: Where there was a previous bid by the exhibitor involved, the bid set the minimum rental terms and further negotiations favored the distributor. If there was no previous bid from the exhibitor, the ultimate terms depended on either competition or the strength of the exhibitor's bargaining position.[8]

Mr. Goldman's philosophy on this procedure has already been examined in detail: He found bidding to be economically disastrous since it drove up the film price, and consequently maintained he would only negotiate. The whole purpose of the split in his view was to permit him to bypass the need to bid. Prior

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[8] The difference between the two types of negotiations is demonstrated by several of the MGM bids. Viking negotiated several of its early MGM films, including the "Glass Slipper." R. 1407. This negotiation, however, was based on an earlier bid. Goldman, on the other hand, offered to negotiate without an earlier bid. A letter from the MGM branch manager to the home office shows this difference:

> "Dear Mr. Bezahler:
>
> In accordance with our conversation we are attaching bids on THE GLASS SLIPPER from the Translux and Viking Theatres.
>
> . . .
>
> GLASS SLIPPER was on the Goldman split and in a telephone conversation with Mr. Beattie he said he would be glad to negotiate for the picture to play in the Randolph for Easter playing time, which would be approximately April 7th. However, he would not make a firm offer. . . ." R. 2523.

Similar examples of this are found at R. 2506, 2509.

to the split agreements, when he faced substantial competition from Stanley Warner, Goldman himself admitted that the only way he could obtain pictures was by bidding, since the distributors did not hang around to see what he would offer on negotiation. Under the split, however, Goldman obtained all the pictures he needed to fill three theaters, entering a bid on only 11 out of the 134 pictures he licensed during the suit period.[9] R. 192-93. This alone demonstrates the weakness of the remaining competition from Viking and the independents in the Goldman sub-market. Controlling 80% of the seats available in this sub-market, Goldman called the shots on which distributor would get the best showing for films on the Goldman split. Thus trapped, the distributors naturally acceded to his preference for negotiations where his monopoly bargaining power would do him the most good.

Not satisfied with this advantage, however, Goldman further used his monopoly bargaining position to extract the so-called Schwalberg agreement from aquiescent distributors—exclusive negotiating rights after the rejection of his competitors' bids. The Court of Appeals admitted that a jury question was presented on the existence of this agreement with Paramount. However, a similar agreement appears to have been in operation with other distributors as well. For example, on two occasions, Warner Bros. requested bids for pictures on the Goldman split. R. 2359. Viking submitted bids. In the subsequent letters rejecting Viking's bids, Warner Bros. announced that the films

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[9] By comparison, Viking had to enter bids on 16 of the 32 films it played. R. 1039.

had been licensed to Goldman. R. 2612-13. What remained unexplained, however, was the fact that Goldman had not submitted bids on either film. R. 192-93. Clearly, Goldman had been given an exclusive right to negotiate for the films after all the bids were in. And, as under the Schwalberg agreement, Warner Bros. did not take his negotiated "bid across the street and try to better it."

One of these examples warrants further elaboration, since it shows several of the discriminatory devices in operation at once. "The McConnell Story" was a Warner Bros. picture on the Goldman split, R. 2359, with a stated availability date of "on or about August 25, 1955." R. 190. Viking submitted a bid for the picture on July 15, 1955, which was rejected on July 19, 1955. R. 2612. Mr. Mansell of Warner Bros. testified that Viking's offer was rejected because Viking was committed at the time to run "Not As A Stranger" until September 8, 1955, two weeks after the availability date of "The McConnell Story." R. 2044. Mr. Mansell went on to say that the picture was negotiated to Goldman *in August* for the Randolph. Although the Randolph was at that time committed to playing a United Artist picture until September 27, 1955, a full month after the availability date of "The McConnell Story", Mr. Mansell testified that Goldman assured him the United Artists commitment would be broken. Mr. Goldman did in fact breach the United Artists contract over the objection of United Artists. However, what Mansell overlooked in his carefully constructed story was that the letter of rejection to Viking on July 19, 1955, stated that the picture had already been awarded to Goldman's Randolph, R. 2612, even though Goldman had

never submitted a bid, R. 192-93. This example shows not only the Schwalberg-type agreement in operation, but also the strict way in which the distributors held Viking to the terms of its contracts, and the cavalier way in which Goldman was permitted to shuffle films about at his whim and fancy.

Result of the Conspiracy

The detrimental effects of the split system and the inevitable discriminatory practices which it engendered, are indelibly written in the business records of the respective exhibitors. A central economic fact of the motion picture industry is that box-office receipts diminish as a picture runs. R. 2644-48; 292-93. The better the picture the slower the decline, R. 293; but with every picture there comes a point where receipts no longer cover costs. This fact of business life lay behind Goldman's policy of yanking a picture from the Randolph when the weekly gross dipped below $10,000. R. 1829. Thus, to succeed, an exhibitor must curtail the runs of poor pictures and confine his long runs only to good pictures. He can survive with comparatively poor pictures if he limits their runs to a week or so. A rough measure of success, therefore, consists of two factors: quality of films and number of films. As quality goes down, number must go up. If both are down, a theater must stagger and fail.

Examined in the light of this analysis, the result of the conspiracy becomes clear. Viking played substantially fewer pictures with substantially less total value than any of the respondent exhibitors. Viking played 32 pictures; the Goldman theaters averaged 45; the Stanley Warner theaters averaged 97; and Fox played

41.[10] The total national film rental of the pictures Viking played was $45 million, while Goldman and Stanley Warner averaged about $72 million per theater and the Fox figure was $80 million. R. 1048-49.

These figures are explained by the fact that Viking played fewer quality pictures and had a slower turnover of poor pictures than any of the respondent exhibitors. Of the high quality films with national film rental over $4 million, Viking had one, while the six Goldman and Stanley Warner theaters averaged 4.3 each, and Fox had four. R. 1043-44. As to films with national film rental over $3 million, Viking had two, Goldman's theaters averaged six, Stanley Warner's theaters averaged 6.6, and Fox had nine. *Ibid.* Of the low quality films, Viking had 16 with national film rental of under $1.5 million, which it played for 44 of the 123 weeks covered by the suit. R. 294-296. The Goldman Theatre, by contrast, in the 52 weeks in which it played such slough product, played 52 pictures. R. 892; see also Goldman Brief in the Court of Appeals, p. 3. What this means is that Goldman was able to get those pictures in and out in a week, with an excellent chance to show a profit,[11] while Viking had to run them for an average of almost three weeks, either because required by contract or because it could get no pictures to replace them. The merest glance

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[10] R. 2644-48; 2751-54; Goldman Brief in the Court of Appeals, p. 3; Stanley Warner Brief in the Court of Appeals, p. 24. A copy of each of these briefs has been lodged with the Clerk of the Court.

[11] Stanley Warner followed a similar policy. It played pictures of lower average national film rental than Viking, but it turned them over so rapidly (97 pictures per theater as compared with Viking's 32) that it skimmed off the profits and avoided the losses.

at Exhibit P-176, R. 2644-48, will show that on such slough pictures, Viking had to lose money after the first week. Moreover, because of the discrimination practiced by the distributors, Viking could not follow Goldman's practice of curtailing runs when they became uneconomic.

One final effect follows almost syllogistically from the respondents' own admissions. According to Mr. Goldman, competitive bidding drives up the price for films; he therefore negotiated all but a handful without a prior bid. According to Mr. Fabian, the split permitted Stanley Warner to obtain an increased number of films without any outside competition and the rest by intermittent competition against the weaker independents. Viking, however, had to bid for a majority, and compete for every picture it obtained against stronger and larger competitors with near monopolies in their respective sub-markets. By Mr. Goldman's own standards, then, Viking had to pay substantially more for its films than either Stanley Warner or Goldman. And in fact, it had to pay more than it would have in a freely competitive market. First, Viking had either to take what no one else wanted or else make an offer sufficiently high to make it worth a distributor's while to risk alienating a monopolist, an example of this being the Universal block-booking incident. Second, Goldman and Stanley Warner could conserve resources under the umbrella of their no-competition agreements while Viking was out of the market, and then, if they wished, bid up films when Viking came into the market beyond even what they would have been in a freely competitive market. The substantial difference in film cost this analysis would suggest is borne out by the record.

Viking paid out 52% of its box-office receipts in film rental during the period in question while the average for Goldman and Stanley Warner theaters was only 40%. In more detail, those theaters closest in size to Viking paid the following:

Theater	Seating	Film Rental as % of gross receipts[12]
Viking	1017	52%
Goldman	1100	33%
Midtown	994	42%
Stanton	1373	38%

With lower relative film costs, Goldman and Stanley Warner could obtain a higher net income and better return on their capital—the ultimate standard of business success or failure. This competitive advantage over Viking is a direct consequence of the split system.

SUMMARY OF ARGUMENT

The purpose of the split system was to eliminate competition between the three respondent exhibitors. This was accomplished by a three-way division of the film market with each of the respondent exhibitors concentrating its total market power into one of the three sub-markets. The result was to give each respondent exhibitor monopoly bargaining power over films within its sub-market. Such market divisions are condemned by the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955), and were found *per se* illegal under Section 1 of the Sherman Act in *Addyston Pipe & Steel Co.* v. *United States,* 175 U.S. 211.

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[12] All percentage figures are calculated on the basis of gross income and film rental figures appearing at R. 2067.

The same result is reached under the more generally applicable Sherman Act standards. Section 1 is violated where either the intent or effect of a conspiracy is to accomplish a forbidden result. *Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 614. Where the conspiracy and restraints give monopoly market control, Section 2 of the Act is also violated. *United States* v. *Griffith,* 334 U.S. 100. In this case, the split system, involving 83.2% of the available Philadelphia seating, gave the respondent exhibitors monopoly market power. The intent of the system, as the Schwalberg Agreement demonstrates, was to give the respondent exhibitors unlawful competitive advantages over the petitioner. These discriminatory advantages are outlined in the Statement of the Case.

The Court of Appeals found there was no conspiracy because there was no evidence that any one distributor was aware that any other distributor was favoring the respondent exhibitors by the same discriminatory practices, i.e., rental and playing time adjustments, fewer guarantees, Schwalberg-type agreements. To reach this conclusion, the Court of Appeals ignored this Court's recent caveat in *Continental Ore Co.* v. *Union Carbide Corp.,* 370 U.S. 690, 698-99, that it should view the character and effects of the alleged conspiracy as a whole. For the conspiracy in this case was complete when the split system was instituted. The discriminatory practices are merely illustrative of the illegal effects the conspiracy had on the market. In any event, one distributor and one exhibitor are sufficient to constitute a conspiracy, *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 160, and the

case should therefore have been remanded for a new trial under the Court of Appeals' own findings.

A second error by the trial court placed an impossible evidentiary obstacle in the petitioner's path. By confusing proof of injury with proof of conspiracy, the trial court ruled that all evidence must be limited to transactions in which the petitioner participated. On this basis it rejected a series of offers of proof designed to compare the distributors' treatment of the respondent exhibitors with their treatment of the petitioner. Without such comparisons, the unlawful effects of the conspiracy are practically impossible to show. This evidentiary limitation is contrary to the directions of this Court on the reversal and remand of *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690, 709-10. It is also contrary to the holding in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527, that restraints of trade must be analysed in terms of general market conditions. The respondents have been unable to muster authority to support the trial court, and the Court of Appeals avoided the issue altogether.

By its decision below, the Third Circuit has emasculated the private antitrust action within its jurisdiction. The decision epitomizes what Mr. Lee Loevinger describes as the general hostility of the lower federal courts to the private antitrust plaintiff, a hostility contrary to this Court's instruction in *Radovich* v. *National Football League*, 352 U.S. 445, 454. Loevinger, "Private Action—The Strongest Pillar of Antitrust," *Hoffmann's Antitrust Law and Techniques*, (1963). The effect of such hostility is to throw upon the Justice Department a burden of antitrust

enforcement greater than it can possibly carry. It serves also to increase the burden of this Court since government suits come up on direct appeal under the Expediting Act without the intermediate review of the Courts of Appeals and without the weeding out of the certiorari process.

ARGUMENT

I. THE SPLIT SYSTEM CONSTITUTES A PRIMA FACIE VIOLATION OF SECTIONS 1 & 2 OF THE SHERMAN ACT

A. The Split System is a Division of the Market Per Se Illegal Under Section 1 of the Sherman Act.

By validating the split system in this case, the court below has authorized buyers' restraints of the trade of motion picture distribution no less offensive to the antitrust laws than the sellers' restraints struck down in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131. For the Philadelphia split system is nothing more nor less than a division of the market among buyers, a *per se* violation of Section 1 of the Sherman Act under an unbroken chain of Supreme Court and lower court opinions.

If the present case involved a division of markets among *sellers,* the result would be a foregone conclusion. Long before the Sherman Act, contracts dividing marketing territories were held void and unenforceable under the common law because of their inevitable anti-competitive effects. *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 497. That they were equally invalid and actionable under the Sherman Act was concluded in *Addyston Pipe & Steel Co.* v. *United States,* 175 U.S. 211, and more recently re-affirmed in *United States* v. *National Lead Co.,* 332 U.S. 319,

affirming 63 F. Supp. 513 (S.D.N.Y. 1945), and in *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593.

Although many of the cases speak in terms of territorial divisions, the essence of the illegal restraint is the division of *customers* between the conspirators. Thus an agreement by three national beer distributors not to solicit each other's draft beer customers in a single territory was held illegal on a theory identical to the *Addyston* line of cases. *Johnson* v. *Joseph Schlitz Brewing Co.,* 33 F. Supp. 176 (E.D. Tenn. 1940), *aff'd,* 123 F. 2d 1016 (6th Cir. 1941). In accord with this conclusion, the Supreme Court referred to "allocation of customers" as "per se violations under § 1 of the Sherman Act." *Continental Ore Co.* v. *Union Carbide Corp.,* 370 U.S. 690, 708.

Although the split in this case is a division of the market among buyers rather than sellers, the applicable case law is identical. The Sherman Act applies to buyers' conspiracies as well as to sellers'. *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U.S. 219, 235. And the *per se* rules applicable to sellers have been applied equally to buyers. *Mandeville Island Farms, supra,* (price fixing); *Klors* v. *Broadway-Hale Stores,* 359 U.S. 207 (group boycott instituted by "monopolistic buying power"). This conclusion is nowhere more evident than in the series of Supreme Court cases concerning conspiracies among motion picture exhibitors involving the whole spectrum of traditional monopolistic and anti-competitive practices. *Interstate Circuit* v. *United States,* 306 U.S. 208; *United States* v. *Crescent Amusement*

Co., 323 U.S. 173; *United States* v. *Griffith*, 334 U.S. 100; *Schine Chain Theatres* v. *United States*, 334 U.S. 110. In each of these cases, the exhibitors had "pooled their buying power for a common end"—namely, "to crush competition." *Crescent Amusement Co., supra*, at 183.

The essence of the split system in the present case, as already pointed out, is the division of the product market among the respondent exhibitors. The purpose of this system, as both Goldman and Stanley Warner freely admitted, was to eliminate competition for films among the respondent exhibitors, a system that rendered non-competitive 83.2% of the available seating in the Philadelphia market. Goldman disliked competition because it tended to drive up the price, and Warner Bros. admitted that the system resulted in lower rental terms for its product. On these admissions alone, a jury would be warranted in concluding that (1) substantial competition had been eliminated, and (2) the resultant noncompetitive block represented sufficient buying power to affect significantly the market price.

It is equally apparent that the split system greatly increased the respondent exhibitors' bargaining power over their respective splits to the detriment of distributors and independent exhibitors such as Viking. For not only did the respondent exhibitors concentrate their buying power in their respective split markets, but this very concentration vitiated the effectiveness of the independents who still competed in all markets.

On the basis of these facts there can be little doubt that the split system in this case has every attribute

of the classic division of markets agreement. Such agreements were severely condemned in the following analysis in the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955), p. 26:

> "Where actual or potential competitors agree not to compete in specified territories, or for specified customers, the consequence is to reduce the number of sellers [buyers] in each affected market. Competition among the contracting parties is eliminated even more completely than had they agreed on prices but still did business in the relevant markets. The contracting parties gain only if the result is to give each a substantial degree of power in his own market. If a large number of strong competitors remain despite the contract, no contracting party profits from elimination of even a significant competitor. Where market division agreements among competitors are proved, they are held to be unreasonable, on the analogy of the *Trenton Potteries* decision, by reason of their character and necessary effect on competition. They are agreements with no purpose other than the elimination of competition; and, where significant shares of the market are involved, their effect on the degree of competition in the market can be severe."

The Report concluded:

> "There is little doubt, either as a matter of principle or of precedent, that agreements among competitors for market division should be and are treated like price control arrangements." *Ibid.*

On the basis of this analysis and the *Addyston Pipe* line of cases, the petitioner argues that both lower

courts should have held the split system *per se* illegal under Section 1 of the Sherman Act.[13]

B. The Evidence Reveals a Conspiracy to Violate Sections 1 and 2 of the Sherman Act

The result, however, need not depend only on the division of the market theory; it is the same under practically any antitrust theory chosen. The general rule applicable under Section 1 of the Sherman Act is found in *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 614:

> For purposes of § 1, "[a] restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal *per se*." *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 522. Since the requisite intent is inferred whenever unlawful effects are found, *United States* v. *Griffith*, 334 U.S. 100, 105, . . . the contracts may yet be banned by § 1 if unreasonable restraint was either their object or effect.

Under Section 1, the size of the conspiracy would not appear to be a necessary factor. For even if the conspiracy has insufficient market power to accomplish the forbidden result, a specific illegal intent will suffice. As was stated in *United States* v. *Griffith*, 334

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[13] The respondent distributors, having concurred and acquiesced in the split system, are also liable for violating the Sherman Act even though the system was primarily for the benefit of the respondent exhibitors. *Interstate Circuit* v. *United States*, 306 U.S. 208; *Klors* v. *Broadway-Hale Stores*, 359 U.S. 207. "For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." *United States* v. *Paramount Films, Inc.*, 334 U.S. at 161.

U.S. 100, "a showing of [specific] intent . . . is necessary only where the acts fall short of the results condemned by the Act." However, where the size of the conspiracy is substantial, and where the combined market power of its members is sufficient to dominate the market, not only Section 1, but also Section 2 of the Sherman Act (which condemns conspiracies to monopolize any part of interstate commerce) is involved. As Justice Douglas states in *Griffith*, "those things which are condemned by § 2 are in large measure merely the end products of conduct which violates § 1." 334 U.S. at 106. After further analysis of Section 2 cases, Justice Douglas then concludes:

> It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, *to gain a competitive advantage*, or to destroy a competitor, is unlawful. 334 U.S. at 107. (Emphasis added.)

The case at bar has all the elements necessary to constitute a violation of both Sections 1 and 2—conspiracy, monopoly market power, unlawful results, and specific unlawful intent.

The conspiracy involves both direct and circumstantial evidence. The express split agreements were instituted and carried out by meetings between representatives of Goldman and Stanley Warner on the one hand, and each of the respective distributors involved on the other. The allocation of Twentieth Century Fox films to Fox Theater may be inferred from the carefully worked out pattern of business dealings among Goldman, Stanley Warner, Fox Theater, and Twentieth Century Fox. By admissions of the respondents, this split system eliminated all competi-

tion among 7 of the 12 first-run theaters in the Philadelphia market comprising 83.2% of the available seating.

The elimination of competition from such a substantial portion of the market alone makes the system suspect and provides direct evidence of dominant market position and monopoly power. In the early railroad cases, *Northern Securities Co.* v. *United States,* 193 U.S. 197, and *United States* v. *Union Pac. R. Co.,* 226 U.S. 61, where four major railroads controlled the major railroad arteries from the Mississippi to the West Coast, the Court found the elimination of competition between any two of them to be a sufficient reason to enjoin a merger as a violation of the Sherman Act. Similarly, in *United States* v. *Trenton Potteries Co.,* 273 U.S. 392, 397, the Court found price fixing to be a *per se* violation of the Sherman Act primarily because:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.

And finally, as alluded to earlier in this brief, in *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 149, the Court found pooling and joint ownership agreements illegal because they had "the effect of nullifying competition between the allied theatres. . . ."

While the elimination of competition between members of a combination or conspiracy may not be a violation of the Sherman Act where the percentage of the market involved is small and the objective a lawful one, e.g., *United States* v. *Columbia Steel Co.,* 334 U.S. 495, 529 (a merger involving 24% of the relevant

market),[14] it has invariably been considered a primary index of monopoly where the percentage is large. E.g., *American Tobacco Co.* v. *United States*, 297 U.S. 781 (involving the manufacturers of 80% of the domestic cigarettes).[15] For size is an "earmark of monopoly power." *United States* v. *Griffith*, 334 U.S. at 107 n. 10. In the case at bar, the percentage of the market from which competition has been eliminated by the respondent exhibitors' split system is as large as in the *American Tobacco* case, and the power of these exhibitors to affect the market price is admitted. From this alone the Court may find a violation of the Sherman Act. Any remaining doubt, however, that the respondent exhibitors had and misused monopoly power is removed by the evidence of unlawful effects already outlined in the Statement of the Case.

To summarize, Mr. Mansell of Warner Bros. testified that the split system lowered the price of film product to the respondent exhibitors. Mr. Goldman's explanation of this was that under the split he need not bid for films but could negotiate for more favorable terms, a result which had proved unattainable when he was competing with his near-equal co-conspirator, Stanley Warner. The respondent exhibitors further used their dominant market position to extract

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[14] Although even this relatively small amount split the Court 5 to 4, Justices Douglas, Black, Murphy, and Rutledge dissenting.

[15] See also *Trenton Potteries Co., supra,* (involving 82% of the vitreous pottery bathroom fixtures manufacturers); *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553 (involving the refiners of 70 to 80% of the domestically consumed sugar); *Paramount Pictures Inc., supra,* (where on remand it was found that five of the eight defendants owned 70% of the first-run theatres in the 92 largest cities in the country, 85 F. Supp. 881).

numerous rental and playing-time adjustments, often over the distributors' objections. Viking, on the other hand, had to bid on a majority of its films, had to offer a disproportionate number of rental guarantees to obtain film product, and was refused equal treatment on adjustments. Viking thus received fewer pictures, had to pay more for them, and had to play them longer than any of the respondent exhibitors. This situation not only put Viking at a competitive disadvantage, but created a significant barrier to entry for any new exhibitors. These facts not only establish a prima facie violation of Section 2 of the Sherman Act, they conclusively demonstrate violation of Section 1.

In addition to all the above, the record discloses the specific intent of the respondent exhibitors to use the split system to obtain discriminatory competitive advantages over non-members. By the Schwalberg agreement, Goldman and Stanley Warner not only demanded and obtained a split agreement, but further obtained exclusive negotiating rights after the rejection of bids of all competitors. This agreement shows beyond doubt a specific intent to obtain unlawful competitive advantages over non-member competitors and future entrants into the market. As an expression of the respondent exhibitors' intent, the Schwalberg agreement is not limited to Paramount films, but taints the whole split system.

C. The Court of Appeals Erred in Disregarding Evidence of Conspiracy

To reach the contrary conclusion, the court below had to disregard this Court's recent caveat in *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690, 698-99,[16] that it should view the character and effect of the alleged conspiracy as a whole. Instead, it treated the petitioner's claims as a series of separate conspiracies, and found reasons why the evidence relevant to each should not be considered. The Court disregarded the Schwalberg agreement on the ground that only one distributor conspired with the respondent exhibitors, R. 2778; it further disregarded evidence of rental adjustments and other discriminatory practices on the ground that the respondent distributors were not shown to have conspired to engage in each of those activities, R. 2780, 2788-90. It further held that the doctrine of conscious parallelism would not correct this last defect. R. 2789-90.

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[16] The Court stated:

"It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '. . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States* v. *Patten*, 226 U.S. 525, 544 . . .; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 106 (C.A. 6th Cir.). See *Montague & Co.* v. *Lowry*, 193 U.S. 38, 45-46."

This analysis, however, misconceives the petitioner's position. The conspiracy was complete when the distributors agreed to institute the split system among the respondent exhibitors. The discriminatory practices are themselves merely illustrative of the illegal effects the conspiracy had on the market. The fact that different distributors chose to favor the respondent exhibitors in different ways is of no consequence. Whichever practice a distributor chose to follow, whether it be a Schwalberg-type agreement, discriminatory adjustments or what have you, it was still reacting to the increased bargaining power granted the respondent exhibitors under the split system and to their specific intent to use the split system to their own advantage.

Moreover, even if one were to grant the Third Circuit's dubious findings on conspiracy, its conclusion would still be in error as a more careful examination of its holding on the Schwalberg agreement will show. For the court below admitted that a jury question was presented on the existence and operation of the Schwalberg agreement among Goldman, Stanley Warner, and Paramount, but it then concluded that no conspiracy was shown since only one distributor was involved. Not only is there no authority for this anomalous result, but it flies directly in the face of this Court's decision in the *Paramount* case. Involved in that case were discriminatory contract provisions (not unlike the discriminations involved in this case) which favored the large exhibition circuits. The Court summarized the lower court's findings as follows:

> The District Court found that the competitive advantages of these provisions were so great that their inclusion in contracts with the larger cir-

> cuits and their exclusion from contracts with the small independents constituted an unreasonable discrimination against the latter. *Each discriminatory contract constituted a conspiracy between licensor and licensee.* Hence the District Court deemed it unnecessary to decide whether the defendants had conspired among themselves to make these discriminations. 334 U.S. at 160. (Emphasis added.)

The Court then concluded:

> These findings are amply supported by the evidence. We concur in the conclusion that these discriminatory practices are included among the restraints of trade which the Sherman Act condemns. *Ibid.*

From this it would appear crystal clear that only one distributor is necessary to a conspiracy in violation of Section 1 with an exhibitor and that under the Third Circuit's own findings, the case should have been remanded for a new trial.

D. A Split System Involving Only Part of the Relevant Market Cannot Constitute a Reasonable Restraint

The only argument put forward to support the split system as a reasonable market restriction is found in *Brown* v. *Western Mass. Theatres, Inc.*, 288 F. 2d 302 (1st Cir. 1961). The court there noted that competitive bidding was considered suicidal to exhibitors and concluded that a split system was a valid alternative method of distribution. The respondents have taken further solace from the Justice Department's approval of a split in two small towns, Alpine and Wichita Falls, Texas, involving two and three exhibitors respectively.

The soundness of this argument is doubtful. It is little more than a variation on Mr. Goldman's conclusion that he found competitive bidding economically "disastrous." It is refuted in this case by the fact that Viking along with the other independents managed against great odds to stay alive for the 123 weeks relevant to this suit bidding competitively in a market rampant with monopoly restrictions. Predictions of disaster are nothing new to the anti-trust laws. As early as *Northern Securities Co.* v. *United States*, 193 U.S. 197, 351, the Court noted:

> Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its [the Sherman Act] provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions.

A similar thought was echoed in one of the early motion picture cases, *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 187-88:

> Congress has made that choice. It has declared that the rule of trade and commerce should be competition, not combination. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397. . . . Since Congress has made that choice, we cannot refuse to sustain a decree because by some other measure of the public good the result may not seem desirable.

Moreover, even if the threats of suicide are to be believed, the *Brown* argument has no application here.

The Justice Department's action in the two small Texas towns was conditioned on the split being equitable and consented to by all exhibitors. By letter to counsel for the petitioner, the Department expressly limited its approval to the facts of those cases. See letter reprinted in Appendix to this Brief.[17] The Department has never extended this position to the situation where not all the exhibitors are included in the split. Nor has it stated its position where a party with an adverse interest opposes even an all-inclusive split. *Cf. Samuel Goldwyn Productions Inc.* v. *Fox West Coast Theatres Corp.*, 194 F. Supp. 507 (N.D. Cal. 1961) (all-inclusive split held illegal).[18]

In this case the split system is not all-inclusive. The respondent exhibitors, representing seven of the 12 first-run theaters in Philadelphia and backed by the buying power of significantly larger chains outside this market, have employed the system to restrict only a part of the relevant market. At that point, all the discriminatory power latent in the restricted system

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[17] This letter was also printed in the petitioner's Brief in the Court of Appeals, p. 23, a copy of which has been filed with the Clerk of the Court.

[18] That suit was by a producer who claimed that split systems among all the distributors and exhibitors in various far-western markets violated the Sherman Act and caused unreasonably low returns on the distribution of his pictures. The district court agreed, calling the split system a collusive allocation of films. The case was appealed to the Ninth Circuit where it was argued and submitted in September 1963.

Moreover, in *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F. 2d 246, 250 (2d Cir. 1959) where a split system was involved but not in issue, Judge Washington seemed to have doubt as to the legality of the system.

comes to bear on the independent exhibitors and Viking. Nothing short of legislative immunity from the antitrust laws would permit a court to overlook the resultant discriminations found in the record in this case.

II. EVIDENCE RELEVANT TO PROOF OF CONSPIRACY MAY NOT BE LIMITED TO TRANSACTIONS IN WHICH PETITIONER PARTICIPATED

The decision below rests on a theory of evidence which, if not exploded by this Court, could well spell an end to private antitrust suits.

A total of 468 films were licensed to first-run theaters in the Philadelphia area during the suit period. Viking expressed an interest in only 87. In a misguided attempt to limit the size of the case, the trial court ruled that evidence would be admitted on only these 87.

To understand the importance of this ruling it is necessary to state the context in which it arose. The ruling was first made early in the trial. R. 216-18. However, due to its effect on the petitioner's case, additional time was set aside midway in the trial for reargument. R. 1039. At that time, petitioner's counsel described in an oral offer a series of evidentiary comparisons which went beyond the 87 films. At the conclusion of the argument, the trial court held that its earlier ruling would apply, and, on this basis, it rejected a majority of the offers of proof. Thus, in one fell swoop it excluded every comparative figure used in the Statement of the Case to show the respondent exhibitors' dominant economic market power under the split system, and every comparative figure used to show the discriminatory purposes to which

this power was put. The comparisons include those based on film rental adjustments, number of bids made, number of quality pictures obtained per theater, number of pictures played per theater, and number of guarantees made per theater. The comparisons are in the record for demonstration to this Court only by way of offers of proof. Yet without them, the petitioner could not give a coherent statement of the conspiracy.

To support its ruling, the trial court rationalized that since Viking could only be injured with respect to films on which it bid, evidence as to the remaining 381 was irrelevant. R. 216-18. For authority it relied on cases submitted by the respondents which are completely unrelated to, and do not even mention, the admission or exclusion of evidence.[19] What the petitioner argued, and what the trial court failed to perceive, was that evidence relevant to proof of a conspiracy presents a question separate from the evi-

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[19] The cases submitted by the respondents establish the self-evident proposition that an antitrust plaintiff cannot recover damages for restraints of trade in a market which he did not attempt to enter during the relevant period. *Lawlor* v. *National Screen Service Corp.*, 270 F. 2d 146 (3d Cir. 1959); *Royster Drive-in Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F. 2d 246 (2d Cir. 1959); *J. J. Theatres, Inc.* v. *Twentieth Century Fox Film Corp.*, 212 F. 2d 840 (2d Cir. 1954); *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561 (7th Cir. 1951). None of these cases involve rulings on admission or exclusion of evidence. All of them include evidence of market conditions and transactions in which the plaintiff did not participate. And none of them found such evidence erroneously admitted. They are completely inapplicable here since Viking was admittedly in the market for films throughout the period involved in this case.

dence relevant to the scope of recovery. And contrary to the trial court's ruling, evidence relevant to proof of a conspiracy is by no means limited to transactions in which the plaintiff participated; indeed, such evidence may relate to events occurring before the plaintiff's existence.

In *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690, 709-10, the plaintiffs sought to introduce evidence to prove the origin and development of the alleged conspiracy and monopolization during the eight years prior to their entry into the market. The trial court found all such evidence irrelevant. On sending the case back for a new trial, the Court directed:

> This evidence was clearly material to petitioners' charge that there was a conspiracy and monopolization in existence when they came into the industry, and that they were eliminated in furtherance thereof.

Accord, *Bausch Machine Tool Co.* v. *Aluminum Co. of America*, 72 F. 2d 236 (2d Cir. 1934). Similarly, the Court has always found an analysis of the existing market structure and business practices during the suit period relevant to the determination of a statutory violation. In *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527, the Court said that "in determining what constitutes unreasonable restraint," it looks "to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market." When such an analysis reveals that the defendants have dominant market power and en-

gage in practices intended to eliminate or unduly restrict competition, a violation of the Sherman Act is found. *American Tobacco Co.* v. *United States*, 328 U.S. 781. When either of these factors is missing, it is not. See *United States* v. *Columbia Steel Co., supra; Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594. And especially, where the theory of the case is based on discriminations in favor of certain co-conspirators, all of the co-conspirators' activities should be taken into account to form a valid basis of comparison.[20]

In other words, the existence and effect of the conspiracy must be viewed in terms of the total market, and the applicable rules of evidence on this issue

[20] The trial court's evidentiary ruling also makes it impossible to prove certain legal theories relevant to violations of the Sherman Act. In the Court of Appeals, in the Petition for Certiorari, pp. 10-12, and in this Brief, the petitioner has argued that due to the split system eliminating competition between the respondent exhibitors, these exhibitors have been able to conserve resources while Viking was out of the market and then drive the price of films unreasonably high when Viking was in the market, gradually driving Viking out of business. Proof of this theory requires a comparison of film prices when Viking is in the market and when Viking is out of the market. However, by definition, Viking cannot express interest in a film when it is not in the market. Under th trial court's evidentiary limitation, therefore, it becomes impossible to make the comparison necessary to proof of this legal theory.

As one might expect, in the Brief in Opposition to the Petition for Certiorari, p. 14, the respondents argue there is not "the slightest evidentiary basis" for this legal theory in the record. They are therefore caught in the paradoxical position of arguing that due to the absence of certain evidence the trial court did not err in directing a verdict while in the next breath on a different page they claim such evidence would be irrelevant.

should be the same whether the plaintiff is the United States or a private party. In this case, by confusing proof of conspiracy with proof of injury, the trial court excluded the evidence most probative of dominant market power under the split system and of discriminatory effects resulting therefrom, the very core of a Sherman Act violation.

This point of evidentiary error was of such importance to the petitioner that it was made the opening argument in the brief below. The respondents, having no answer to it, relegated their reply to a footnote at the conclusion of their brief which recited out of context the cases they had used in the trial court. The Court of Appeals avoided the issue altogether. Some of the offers of proof were never mentioned in the opinion.[21] Others, the court below disposed of on grounds that were arbitrary in view of the context involved. For example, the court below affirmed the exclusion of the offer to show that the respondents received overwhelmingly more film rental adjustments per theater on the ground that the offer failed to show which distributors made the adjustments. However, in the context in which the oral offer was made, the question of who made the adjustments was never at issue. Moreover, it is difficult to conceive of a way in which the offered evidence could be introduced without identifying who made the adjustment. In this context, the Court of Appeals decision was arbitrary

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[21] For example, the court below failed to mention the offer to show that Viking played fewer quality films as measured by national film rental and the offer to show that Viking had to bid on substantially more film than did all the Goldman theaters put together.

and simply designed to avoid the important evidentiary limitation argued so strenuously by the petitioner on appeal and before this Court.

If the Third Circuit may allow such egregious evidentiary errors as this to slip by unmentioned and uncorrected, there is little prospect that a private antitrust plaintiff will ever have a chance to prevail within its jurisdiction.

III. THE COURT OF APPEALS HAS CRIPPLED THE PRIVATE ANTITRUST SUIT AS A DEVICE FOR ENFORCEMENT OF THE ANTITRUST LAWS

A reversal of the court below is required in this case in the interests of antitrust enforcement and of lightening the Court's burden in that respect. The bulk of antitrust cases coming to the Court are brought by the Department of Justice and come by way of direct appeal under the Expediting Act, 15 U.S.C. § 29. This mode of access to the Court has serious disadvantages. The Court has no discretion in taking the case, and must forego the advantage of an intermediate appeal which would sift the important issues from the usually gargantuan record. Moreover, since civil cases brought by the United States are tried to a judge, there is a marked tendency towards *per se* rulings with correlative loss of the flexibility inherent in jury dispositions. The number of such government-brought cases will tend to be limited to the extent that the antitrust laws can be vigorously enforced through private antitrust actions.

Similar observations have been recently reiterated by Mr. Lee Loevinger. In an article written while head of the Antitrust Division in the Department of Justice, he concluded that, between governmental and

private antitrust enforcement, the private antitrust action "is both more desirable and more effective." Loevinger, "Private Action—The Strongest Pillar of Antitrust," *Hoffmann's Antitrust Law and Techniques,* vol. 1, p. 374 (1963). His position is based on the fact that (1) the private party is more aware of the existence and effect of antitrust violations within his own industry, (2) private law enforcement is both "more flexible and less authoritarian," (3) the private action grants repair for past economic injury to competitors, and (4) the triple damage recovery is a more effective deterrent than the prospect of a fine or injunction by government action. He concludes that "even a quadruple appropriation for the Antitrust Division would not equal the enforcement effectiveness of private action." *Ibid.*

The efficacy of the private antitrust action, however, depends upon a sympathetic hearing in the lower federal courts. This Court has noted the congressional intent to place the private antitrust litigant in a favorable position, *Radovich v. National Football League,* 352 U.S. 445, 454; but as Mr. Loevinger observes:

> Nevertheless, many courts have an attitude of definite hostility to private antitrust suits; and the decisions are stricter in their interpretation of the laws and more rigorous in their requirements of proof in private suits than in government actions under the antitrust laws. Loevinger, *supra,* p. 377.

The Third Circuit's disposition of this case epitomizes this attitude of hostility. By its holding below, it has emasculated the private antitrust action within its jurisdiction. In particular, it has authorized free

use of the directed verdict and restrictive evidentiary rulings to throw the private antitrust plaintiff out of court without fair consideration of his claim.

A significant distinguishing factor of antitrust law in the judicial process is that, in this area, more than in most others, the individual judges tend to have strong, even if unconscious, economic predilections. The jury system stands as a safeguard against the subversion of antitrust law administration to any such personal economic philosophy. The court below, by approving a free-wheeling application of the directed verdict, has nullified this safeguard. In an attempt to protect the jury from "speculation," it has taken from it the right to consider the validity of a classic economic restriction, a division of the market. Moreover, even for cases allowed to go to the jury, the court below has approved *sub silentio* an evidentiary ruling that makes it impossible to prove violations involving practices of any greater sophistication than the most neanderthal predatory type.

The importance of these holdings is accentuated in this case by the failure of the Justice Department to take a position on split systems restricting only part of a relevant market. For the petitioner has lost not only his sole effective private remedy, but any expectation of public remedy. With the petitioner's loss of hope goes the respondents' loss of fear to engage in further illegal activities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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January, 1964.

APPENDIX A

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June 21, 1962

The Honorable Lee Loevinger
Assistant Attorney General
Antitrust Division
Department of Justice
Washington 25, D. C.

Dear Judge Loevinger:

Re: Viking Theatre Corporation v. Paramount Film Distributing Corporation, et al., United States Court of Appeals for the Third Circuit, No. 13756

In the oral argument of the above-captioned case before the United States Court of Appeals for the Third Circuit on June 18, 1962, there arose a question of fact which the Court wishes to have resolved by supplemental memoranda.

Counsel for the major film distributors, referring to the practice of "splitting" product, had stated in their brief that the distributors had "on occasion been urged by the Department of Justice to split their product rather than

seek competitive bids." In support of that statement they referred to two letters to the distributors: one allegedly from Assistant Attorney General Robert A. Bicks in November 1960, with reference to a split of product in Alpine, Texas; the other allegedly from Acting Assistant Attorney General W. Wallace Kirkpatrick in 1961 with reference to a split in Wichita Falls.

In oral argument I stated to the Court, on behalf of Viking Theatre Corporation, the appellant, that I knew of no instance where the Department of Justice had countenanced a split of first-run product which excluded any first-run exhibitors. I stated further that the two instances cited by the distributors referred to splits which would not exclude any exhibitor.

Since the record in the case contains neither the two letters in question nor any facts which would serve to elucidate the details, Chief Judge Biggs, on behalf of the Court accepted my suggestion that the matter be elucidated in supplemental memoranda to be filed by counsel for both sides. Toward that end, I should appreciate a statement from you as to the facts of the two situations referred to in the cited Department of Justice letters, *i. e.*, whether the splits referred to in the two situations were to exclude any exhibitor.

I realize that you would probably be reluctant to take a position, in a letter to a private antitrust litigant, as to what the Department's policy may be as to splitting of films and, therefore, I do not ask you to do so. I trust, however, that you will deem it proper to answer the narrow factual question here involved.

Very truly yours,

EDWARD BENNETT WILLIAMS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

Address Reply to the
Division Indicated
and Refer to Initials and Number
LL:WDK:MS
60-6-86
60-6-30-45

June 25, 1962

Edward Bennett Williams, Esquire
Williams & Stein
1000 Hill Building
839 17th Street, N.W.
Washington 6, D. C.

Dear Mr. Williams:

We have your letter of June 21, 1962, concerning letters written by the Department of Justice to distributors about the possible splitting of product in Alpine, Texas, and Wichita Falls, Texas.

You indicate in the last paragraph of your letter that your inquiry is addressed to the "narrow factual question" involved in Alpine and Wichita Falls, and that you are not asking that we indicate the Department's view concerning the splitting of product. We are confining our reply to that "narrow factual question" and express no views herein applicable either generally to the splitting of product or to any particular product split.

In Alpine, two exhibitors were involved, each of which was then operating a single theatre. The Department's letter to each of the distributors to which we wrote (in December, 1960) asked whether the distributor would "be willing to endeavor to bring about an equitable split of your company's product in Alpine as between the Granada and Twin Peaks with the concurrence of the exhibitors involved."

In Wichita Falls, three exhibitors were involved. In the case of each of our letters to the distributors (written in February, 1961), we referred to a "split" of the distributor's product "on an equitable basis among the exhibitors involved with their consent," and asked the distributor to ascertain whether such a split in Wichita Falls "could be worked out."

With respect to neither Alpine nor Wichita Falls did the question of splitting the first run product among less than all of the first run exhibitors come up.

Sincerely yours,

LEE LOEVINGER
Assistant Attorney General
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